



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 13, 2003

Mr. Les Moore
Police Legal Advisor
Irving Police Department
305 N. O'Connor Road
Irving, Texas 75061

OR2003-3209

Dear Mr. Moore:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180952.

The Irving Police Department (the "department") received a request for records relating to the arrest of a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We must first address the department's obligations under section 552.301 of the Government Code. Section 552.301(b) provides that "[t]he governmental body must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information]." Section 552.301(e) provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). As you acknowledge, you failed to submit a copy of the specific information requested or representative samples within the fifteen business day period mandated by section 552.301(e), nor did you submit the written request for information or written comments stating the reasons why the stated exceptions apply within the fifteen business day period. Furthermore, although you now claim that the submitted information is also excepted under section 552.103, this claim was not raised within the ten business day time period prescribed by section 552.301. Thus, you have failed to comply with the requirements of section 552.301.

Because the department failed to comply with the procedural requirements of section 552.301, the requested information is presumed to be public. See Gov't Code §552.302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). Section 552.103, which serves to protect a governmental body's position in litigation, and section 552.108, which protects law enforcement interests, are discretionary exceptions and do not provide compelling reasons to overcome the presumption of openness. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 522 at 4 (1989) (discretionary exceptions in general). But see Open Records Decision Nos. 630 at 3 (1994), 586 at 3 (1991) (need of *another* governmental body to withhold information under predecessor to section 552.108 can provide a compelling reason under section 552.302). Thus, we do not consider your claims under section 552.108 or section 552.103.

However, section 552.101 provides a compelling reason to overcome the presumption that the information is open, and therefore, we address your claim under this exception. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We note that where an individual's criminal history information has been compiled by a governmental entity, the compiled information takes on a character that implicates the individual's right to privacy in a manner that the same information in an uncompiled state does not. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); see also Open Records Decision No. 616 at 2-3 (1993). Based on the reasoning set out in *Reporters Committee*, such a compilation implicates an individual's right to privacy to the extent that it includes arrests and investigations where the individual is a suspect, arrestee, or defendant in a case. However, section 552.023 states that a person or a person's authorized representative has a special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect the person's privacy interest. See Gov't Code § 552.023. Accordingly, to the extent that the department maintains responsive criminal history information that reveals that the requestor's client is a suspect, arrestee, or defendant in a case, the department must release this information to the requestor. To the extent that the department maintains criminal history information on individuals other than the

requestor's client, we conclude that such information must be withheld pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Furthermore, this office has previously concluded that a sexual assault victim has a common-law privacy interest that prevents disclosure of information that would identify him or her. Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, *writ denied*) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy, but because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. Open Records Decision No. 393 at 2 (1983); *see* Open Records Decision No. 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, *writ denied*) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). In this instance, the requestor's client knows the identity of the victims. We therefore believe that withholding only identifying information from the requestor would not preserve the victims' common-law privacy rights. Therefore, we conclude that the department must withhold the submitted arrest report in its entirety pursuant to section 552.101 in conjunction with common-law privacy.

In summary, to the extent that the department maintains responsive criminal history information that reveals that the requestor's client is a suspect, arrestee, or defendant in a case, the department must release this information to the requestor.¹ The remaining information must be withheld under section 552.101.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

¹ We note that any such information is generally confidential and not subject to release to the general public. However, as noted above, the requestor in this instance has a special right of access to such information. Gov't Code § 552.023. Thus, if the department receives another request for this information from an individual other than this requestor or his client, the department should again seek our decision.

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Bates", with a long horizontal flourish extending to the right.

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 180952

Enc. Submitted documents

c: Mr. J.B. Peacock, Jr.
Gagnon & Peacock, P.C.
4245 N. Central Espressway
Suite 250, Lock Box 104
Dallas, Texas 75205
(w/o enclosures)